CHARTERED BANK

v.

CHEVIOT INDUSTRIES (M) SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. C 1388-84]
7 JULY 1988

CONTRACT: *Guarantee - No fixed rate of interest - No sufficient consideration - No proper demand - Conclusive evidence clause - Whether valid.*

The second defendant executed a guarantee on 5 January 1981 in favour of the plaintiff. The plaintiff was given leave to sign final judgment against the 2nd defendant. The second defendant being dissatisfied appeals against the Senior Assistant Registrar's decision.

The following issues were raised for the determination of the Court.

(a) whether it is contrary to the law to charge interest at 13.25% per annum when the guarantee has not fixed the rate of interest payable.

(b) whether there is sufficient consideration given to the guarantee when part of the loan has been disbursed to the principal borrower before the execution of the guarantee.

(c) whether the demand is proper when the demand notice is not signed.

(d) the effect of conclusive evidence clause.

Held:

[1] The 13.75% interest per annum is the same rate of interest charged by the plaintiff on the loans that has been expended to the first defendant since 1980. It is not a rate that had been indiscriminately imposed by the plaintiff.

[2] Reading the wide expressions used in the guarantee, there is sufficient consideration given for the guarantee and to that extent the plea that there was no consideration must fail.

[3] Counsel for the plaintiff had assured that the exhibited notice of demand is only a file copy which is not normally signed. Since there is no denial that it had not been received and since the contents are clear both in meaning and intent, there is therefore no basis for the second defendant's objection as to the sufficiency of the notice of demand.

[4] Clause 18 of guarantee contain the conclusive evidence clause wherein the second defendant has acknowledged that a certificate by an officer of the plaintiff as to the money and liabilities for the time being due or incurred to the plaintiff from the first defendant, shall be conclusive evidence in any legal proceedings against him. Such a certificate in conclusive evidence of the amount due to the plaintiff from the second defendant.

[Appeal dismissed.]

Case referred to:
Dobbs v. National Bank of Australia Ltd. [1935] 53 CIR 643

Legislation referred to:
Rules of the High Court 1980, O. 14, O. 42 r. 12

For the second defendant/appellant - Saran Singh; M/s. Saran Singh & Co.
For the plaintiff/respondent - K.L. Low; M/s. Arifin & Partners

JUDGMENT

Siti Norma Yaakob J:

In this suit, the second defendant is sued as a guarantor and in his appeal to set aside the O. 14 judgment entered against him, he raised the following 3 objections.

1. The interest charged at 13.75% per annum is contrary to law.
2. There is no consideration for the guarantee.
3. There was no proper demand made.

Since the guarantee has not fixed the rate of interest payable, it is the second defendant's contention that it should be at 8% per annum in compliance with O. 42 r. 12. Now O. 42 r. 12 refers only to the interest to be charged on a judgment debt, but since the rate of interest objected to forms part of the total sum due under the guarantee O. 42 r. 12 has no relevance at all. The 13.75% interest per annum is the same rate of interest charged by the plaintiff on all the loans that had been expended to the first defendant since 1980. It is not a rate that been indiscriminately imposed by the plaintiff and since the guarantee was in consideration of the plaintiff making or continuing making advances to the first defendant for which 13.75% interest per annum was chargeable, I see no merit to the second defendant's objection to the rate of interest payable under the guarantee.

The guarantee was executed on 5 January 1981 but since part of the loans had already been disbursed to the first defendant before that date, the second defendant now maintains that there is no sufficient consideration given to the guarantee and as such cannot be enforced.

It is not disputed that the 1st defendant had been a customer of the plaintiff long before 5 January 1981 and from time to time had been granted overdraft facilities which at 3 September 1983 had been overdrawn in the sum of RM3,270,208.89. Under those circumstances, the consideration given by the plaintiff for the guarantee executed by the second defendant on 5 January 1981 is expressed as "making or continuing advances or otherwise giving credit or affording banking facilities or accommodation for as long as the Bank may think fit". The corresponding obligation on the part of the second defendant was to guarantee payment on demand "for all money and liabilities whether certain or contigent now or hereafter owing or incurred to the Bank from or by the customer" (i.e., the first defendant) "on any current or other accounts or in any manner whatever." Reading the wide expressions used in the guarantee, I consider that there is sufficient consideration given for the guarantee and to that extent the plea that there was no consideration must fail.

As for the objection there was no proper demand made as the notice exhibited by the plaintiff was unsigned, I had considered that here again there is no basis for such an objection. Counsel for the plaintiff had assured me that the exhibited notice of demand is only a file copy which is not normally signed. The first copy that had been sent to the second defendant was duly signed. Since there is no denial that it had not been received and since the contents are clear both in meaning and intent, there is therefore no basis for the second defendant's objection as to the sufficiency of the notice of demand.

Lastly the guarantee itself, cl. 18, contains the conclusive evidence clause wherein the second defendant has acknowledged that a certificate by an officer of the plaintiff as to the money and liabilities for the time being due or incurred to the plaintiff from or by the first defendant, shall be conclusive evidence in any legal proceedings against him. Such a certificate dated 3 January 1985 is exhibited by the plaintiff and following *Dobbs v. National Bank of Australia*

Ltd. [1935] 53 CIR 643, such a certificate is conclusive evidence of the amount due to the plaintiff from the second defendant which under the guarantee, is limited to RM286,800. To that end, I had confirmed the order of the Senior Assistant Registrar giving judgment against the second defendant for the sum claimed by the plaintiff, interests and costs and accordingly dismissed the second defendant's appeal with costs.

Also found at [1988] 2 CLJ 859